



June 28, 2002

Mr. Pete Riojas
Superintendent of Schools
Edcouch - Elsa Independent School District
P.O. Box 127
Edcouch, Texas 78538

OR2002-3519

Dear Mr. Riojas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164992.

The Edcouch Elsa Independent School District (the "school district") received a request for bills, billing statements, invoices, and requests for payment from certain attorneys as well as copies of all checks payable to the attorneys. You claim that some or all of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.114 of the Government Code as well as Texas Rule of Evidence 503.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹You also raised sections 552.104 and 552.105 as possible exceptions to the disclosure of information. However, because you did not provide this office with arguments applying these exceptions to the requested information, we consider these exceptions waived. See Gov't Code §§ 552.301(e), .302; Open Records Decision Nos. 592 (1991) (governmental body may waive section 552.104), 564 (1990) (governmental body may waive statutory predecessor to section 552.105).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We begin by noting that while you have submitted a sample of attorney fee bills, you have not submitted copies or a representative sample of the requested checks. Therefore, we assume that the school district has released this information, to the extent it exists. If the school district has not released this information, it must do so now. *See* Gov't Code §§ 552.301, .302.

Next, we note that the submitted fee bills are subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege

Gov't Code § 552.022(a)(16). Thus, the submitted information is expressly public and may only be withheld if it is privileged under the attorney-client privilege or is otherwise confidential under other law. Sections 552.103 and 552.107 are discretionary exceptions and are not other law for the purpose of section 552.022. Open Records Decision Nos. 663 (1999) (governmental body may waive sections 552.103), 630 at 4 (1994) (governmental body may waive section 552.107(1)). However, we will address your claims under sections 552.101, 552.102, and 552.114 of the Government Code. Furthermore, the Texas Supreme Court recently held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will determine whether the submitted information is confidential under Texas Rule of Evidence 503.

We begin by addressing your argument that portions of Attachments A, B, and C are confidential under Rule 503. Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the layer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). You state that the highlighted portions of Attachments A, B, and C reflect confidential communications between the school district's superintendent and the school district's attorney. We note that you have not highlighted any information in Attachment B. Furthermore, we find that the highlighted portions of Attachment C do not reveal confidential attorney-client communications. However, we agree that the highlighted portion of Attachment A reveals a confidential communication. Therefore, the school district may withhold the highlighted portion of Attachment A under Texas Rule of Evidence 503.

Next, you contend that Attachment D is excepted from disclosure under section 552.114 of the Government Code and the Family Educational Rights and Privacy Act of 1974 ("FERPA"). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a

student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." See Open Records Decision Nos. 332 (1982), 206 (1978). You contend that the information in Attachment D relates to a student complaint. Based on your assertion, we agree that Attachment D consists of a student's education record for the purpose of FERPA. However, based on the information provided, we are unable to fully determine the extent to which Attachment D contains student identifying information. We have marked portions of the information that constitute student identifying information and must be withheld under section 552.114 and FERPA. To the extent any of the remaining information in Attachment D tends to identify a student, the school district must likewise withhold that information under section 552.114 and FERPA.

Finally, you contend that the information in Attachment E is excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

You contend that the fee bill in Attachment E contains information relating to a complaint and investigation into the performance of a school district employee, and “disclosure of such information would constitute an unwarranted invasion of the employee’s personal privacy. . . .” However, based on our review of the information in Attachment E, we find that the information is not so intimate or embarrassing as to be confidential under the doctrine of common-law privacy. Additionally, the public has a legitimate interest in the information. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee’s qualifications and performance and circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of complaint is not protected under either the constitutional or common law right of privacy). Therefore, we find that the information in Attachment E is not excepted from disclosure under section 552.102 of the Government Code and must be released.

In summary, the school district may withhold the highlighted information in Attachment A under Texas Rule of Evidence 503. The school district must withhold any student identifying information contained in Attachment D under FERPA and section 552.114 of the Government Code. The school district must release the remainder of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 164992

Enc: Submitted documents

c: Mr. Juan E. Gonzalez
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(w/o enclosures)